IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-5019
[2013] NZHC 899

BETWEEN	TEGEL FOODS LIMITED Plaintiff
AND	COASTAL CUISINE NZ LIMITED First Defendant
AND	RAYMOND ARNESEN Second Defendant
AND	HELEN ARNESEN Third Defendant

Hearing: 26 April 2013

Appearances: C E Harris for Plaintiff
No appearance for First Defendant
M J W Lenihan for Second and Third Defendants

Judgment: 26 April 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

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[1] Tegel Foods Ltd sues Mr and Mrs Arnesen, the second and third defendants, under guarantees they separately gave Tegel Foods Ltd for payment by Coastal Cuisine NZ Ltd for the supply of chicken by Tegel. Mr and Mrs Arnesen were the directors of Coastal Cuisine NZ Ltd. The sum claimed in the statement of claim is $226,857.37. Tegel applies for summary judgment.

[2] Tegel has filed an updating affidavit by Jessica Sussman giving a calculation as to the principal amount outstanding under the guarantees. After discussion Mr Lenihan accepted the calculations of the amount owing under the guarantees. The calculations show that after taking into account the addition of interest and a payment received from the receivers of Coastal Cuisine NZ Ltd, the balance due at 11 March 2013 was $177,371.14. Interest runs on that sum at 14.8 per cent. I record that to dispose of any questions as to quantum.

[3] Coastal Cuisine NZ Ltd has gone into receivership. The shareholders also passed a resolution for the company to go into liquidation on 7 December 2012. Because the company is now in liquidation, proceedings against the company are stayed under s 248 of the Companies Act 1993. Tegel no longer wishes to proceed against Coastal Cuisine NZ Ltd. It is instead exercising its rights against that company through its securities of which I will say more.

The position of the second and third defendants

[4] Mr and Mrs Arnesen do not dispute that they each gave guarantees. They do not dispute the validity of the guarantees. They accept that the sums for which they are being sued are debts of Coastal Cuisine NZ Ltd, which they guaranteed would be paid. Instead, they raise these points:

[a] They say that Tegel Foods Ltd ought not to pursue them just yet. They say that Tegel Foods Ltd ought to pursue its remedies against Coastal Cuisine NZ Ltd through its security. For that they rely on an argument based on the document of marshalling in equity;

[b] They refer to the prospects of recovery from the receivership; and

[c] Although they do not say so expressly – they ask the court not to exercise its discretion against them by entering judgment at this stage.

Background facts

[5] Tegel Foods Ltd had supplied chicken products to Coastal Cuisine NZ Ltd for a number of years. Mrs Arnesen gave a guarantee of Coastal Cuisine NZ Ltd's indebtedness to Tegel Foods Ltd on 30 April 2009. Mr Arnesen's affidavit shows that the indebtedness of Coastal Cuisine NZ Ltd to Tegel Foods Ltd amounted to a sum of over $1.3 million. In 2012 there was a restructuring. As I understand it, in general terms the indebtedness of Coastal Cuisine NZ Ltd had been assumed by another company, Poultry Distributors 2012 Ltd. Tegel supplied Coastal Cuisine NZ Ltd afresh, but this time from a zero balance. Securities were put in place at the same time - and I will describe the securities shortly. At the same time Mr Arnesen also gave a personal guarantee to Tegel. Mrs Arnesen also signed an amended terms of supply showing that, as guarantor, she consented to the restructuring.

Mrs Arnesen's guarantee

[6] Mrs Arnesen's guarantee is contained in an application for a credit account. It says:

> In consideration of your supplying... the "Customer" with goods in your discretion I/We irrevocably and unconditionally guarantee, as a continuing guarantee, the due payment of all amounts owing to you by the Customer from time to time and at any time. My/Our liability will not be affected by the liquidation of the Customer or a variation of the terms of supply or anything else which may affect the liability of the guarantor only. My liability shall be deemed to be that of a principal debtor.

Mrs Arnesen has signed it. The requirements of s 27 of the Property Law Act 2007 have been satisfied.

Mr Arnesen's guarantee

[7] Mr Arnesen gave his guarantee on 8 June 2012 as part of the agreement for the renewed supply to Coastal Cuisine NZ Ltd by Tegel Foods Ltd. The guarantee is set out in Schedule 2 to that agreement. The relevant provisions are these:

> In consideration of TFL agreeing to continue to supply CCNZL with goods on credit at the guarantor's request the guarantor jointly and severally and unconditionally and irrevocably agrees with TFL that:
>
> 1 The Guarantor with CCNZL are jointly and severally liable to TFL for the due and punctual performance by CCNZL of CCNZL's obligations under this Agreement and all other agreements for the supply of goods to CCNZL by TFL including (without limitation) CCNZL's obligations to pay money.
>
> 2 The Guarantor shall indemnify TFL from and against all losses, expenses and costs, including but not limited to all legal costs (on a solicitor/client basis) and other collection costs, which TFL may suffer or incur as a result of CCNZL's default or failure to comply with any obligation imposed under this Agreement or any other agreement between CCNZL and TFL.
>
> 3 The Guarantor agrees that notwithstanding that as between the Guarantor and CCNZL, the Guarantor may be a surety only, the Guarantor shall be liable to TFL as a principal debtor jointly and severally with CCNZL.
>
> 4 The Guarantor agrees that this guarantee shall be a continuing guarantee and will remain in full force and effect for all future obligations of CCNZL and shall not be discharged or affected by any of the following:
>
> 4.1 the granting of time, indulgence, extension of creditor other concession to CCNZL;
>
> 4.2 any modification, variation or addition to this Agreement or any other agreement between TFL and CCNZL for the supply of goods or other services;
>
> 4.3 The insolvency, liquidation or receivership of CCNZL or any Guarantor of CCNZL's obligations to TFL, or any change in shareholding or directorship of CCNZL; or
>
> 4.4 any other act, event or omission which but for this clause might operate to discharge, or otherwise affect this guarantee and my/our obligations under this guarantee...

[8] Tegel's terms of trade contain retention of the title provisions under which Tegel retained ownership of the goods until they were paid for in full. This was a purchase money security interest under the Personal Property Securities Act 1999. Tegel's purchase money security interest was registered under the Personal Property Securities Register in May 2011.

[9] Tegel was not the only secured creditor of Coastal Cuisine. That company factored its debts to S H Lock NZ Ltd (**S H Lock**). Coastal Cuisine gave S H Lock a general security deed, which gave Lock a security interest over all of Coastal Cuisine's present and after-acquired property and accounts receivable. That was in December 2011.

[10] Further, Coastal Cuisine also gave a general security agreement, registered on the Personal Property Securities Register in May 2009 to Weekend Holdings Ltd. That company is a corporate trustee. The beneficial interests in Weekend Holdings Ltd ultimately are held by Mr and Mrs Arnesen.

[11] The secured creditors entered into subordination agreements which altered the ranking of securities. In June 2012 Tegel, S H Lock and Coastal Cuisine entered into a deed of subordination which provided that if Coastal Cuisine became insolvent:

[a] Tegel's prior registered purchase money security interest over goods supplied by Tegel and the proceeds is subordinated to Lock's general security agreement;

[b] Lock is required to marshall its securities for Tegel's benefit so that, to the extent reasonably practicable, Lock first enforces its security over Coastal Cuisine NZ Ltd's other assets in order to preserve Tegel's ability to recover money under its purchase money security interest;

[c] If Lock receives any payment that is properly due to Tegel under its security, then Lock must hold that payment on trust for Tegel to pay

the relevant amount to Tegel in accordance with the subordination agreement;

[d] Lock and Tegel are to act in good faith and to consult each other in relation to the enforcement of their securities with a view to maximising the recovery for both Tegel and Lock and minimising the costs of recovery.

[12] There was a further deed of subordination of December 2011 under which Weekend Holdings Ltd subordinated its security interest under its general security agreement to that of S H Lock. The effect of both agreements is that:

[a] Lock holds the first-ranking general security interest in relation to all personal property, including those accounts receivable that relate to Tegel supplied goods;

[b] Tegel holds the second-ranking specific security interest in relation to Tegel supplied goods and their proceeds;

[c] Weekend Holdings Ltd holds the second-ranking general security interest over Coastal Cuisine NZ Ltd's present and after-acquired property subject to Lock's and Tegel's prior ranking security interests over Tegel supplied goods and their proceeds.

[13] The indebtedness of Coastal Cuisine NZ Ltd which Tegel relies upon arose out of the supplies of chicken products from June 2012 until August 2012. On 9 August 2012 Weekend Holdings Ltd appointed receivers of Coastal Cuisine NZ Ltd. There were subsequent supplies by Tegel to Coastal Cuisine under the Weekend Holdings Ltd receivership. Those receivers have seen to payment of Tegel's supplies during that receivership. At issue here are the supplies between 12 June 2012 and 9 August 2012. The value of those supplies is $226,847.37.

[14] The appointment of receivers by Weekend Holdings Ltd was a default event under Tegel's terms of trade and under its purchase money security interest. It

entitled Tegel to appoint receivers. The receivers it appointed on 27 August 2012 were Peri Finnigan and Roy Horrocks, experienced insolvency practitioners. They were appointed receivers over Tegel-supplied goods and the proceeds under the specific security interest granted under the Tegel supply agreement.

[15] On 4 September 2012 Lock appointed Ms Finnigan and Mr Horrocks under its general security agreement. Lock and Tegel appointed the same receivers to enable one group of receivers to work efficiently in realising both secured creditors' security interests, and to marshal securities as required under the subordination agreement. There is evidence that the Arnesens were not fully co-operative with the receivers appointed by Tegel/Lock. The relevance of that is that it resulted in Tegel in this proceeding claiming legal costs related to the receivership which Tegel says are recoverable under its terms of trade.

[16] On 7 September 2012 the receivers appointed by Weekend Holdings Ltd retired. The Tegel/Lock receivership has continued. Under that receivership, Lock has apparently received $95,000.00. Tegel has received $70,000.00.

[17] Ms Finnigan says that at the time that she and Mr Horrocks were appointed receivers by Weekend Holdings Ltd, Lock was owed about $262,000, Tegel was owed about $224,000 and Weekend Holdings was owed $4 million – the total indebtedness was $4,487,175.00. There has been some adjustment to those figures in the light of further supplies, and also a later reduction in indebtedness through the receivership.

[18] The fixed assets of Coastal Cuisine NZ Ltd have been sold. The remaining assets are debtors. It is important to realise how debtors are going to be dealt with. As debtors are paid, the receivers will be able to deduct their costs under s 30 of the Receiverships Act 1993. The balance will go into a pool. It will be necessary to establish whether the funds within that pool are traceable as proceeds of Tegel's supplies or of other supplies. Tegel's security goes only to the proceeds of its own supplies.

[19] Among the debtors alleged by Coastal Cuisine NZ Ltd is one for $700,000 payable by Poultry Distributors 2012 Ltd. That company was put into liquidation on 19 September 2012 by shareholders' resolution. The liquidators are Mr Paul Sargison and Mr Simon Dalton, also experienced insolvency practitioners. Mr Dalton confirms that Coastal Cuisine made a claim for some $700,000. He says that, as liquidator, he has not yet made a decision whether to accept or reject that claim. He says that according to Poultry Distributors' records, Coastal Cuisine is owed only $331,000 odd. He also says that Coastal Cuisine is a debtor of Poultry Distributors in the sum of $244,000 and that on the basis of those figures Coastal Cuisine is a net creditor for only the sum of $87,000. Mr Dalton's affidavit also describes steps being taken by him to recover debtors' accounts payable to Poultry Distributors.

[20] Ms Finnigan says that it is difficult to predict what Tegel might eventually recover from the receivership. She gives her opinion that Tegel is unlikely to recover much more than the $70,000 which was paid out on 11 March 2013. Any further payment, if there is one, is likely to be made only after some months. She makes the points that if further payments are received, they will need to be analysed to see what proportion are Tegel proceeds and that receivers' costs will be deducted first.

The creditor's choice of remedies

[21] Before I address the marshalling argument directly, I consider a preliminary matter. The marshalling argument has to be seen as an exception to the normal rule under which a creditor may pursue a guarantor directly and independently of any other remedies that might be taken. I therefore elaborate on that principle.

[22] I call that principle the "choice of remedies" approach. In short, if a creditor has a guarantee, and the creditor also has security over assets of the debtor, then the creditor has a range of remedies available:

[a] The creditor can pursue the debtor directly on personal covenants;

[b] The creditor can exercise its rights under the security; and

[c] The creditor can pursue the guarantor.

Subject to any particular provisions in the contract of guarantee, the general law is that the creditor can choose to exercise what remedies he wishes and in whichever order he wishes. That was recognised in the decision of the Privy Council in *China and South Sea Bank Ltd v Tan*.[1] That was a case where the creditor held security byway of a mortgage over shares. The Privy Council said:

> ... The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times, simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise its power of sale over the mortgaged security he must sell for the current market value and the creditor just decide in his own interest if and when he should sell. ... The creditor is not obliged to do anything. If the creditor did nothing and the debtor declines into bankruptcy the mortgaged security becomes valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay, and the surety is bound by his contract. ...

[23] There is general support for that in *The Modern Contract of Guarantee*.[2] At [11.16] the text says:

> The rationale of this principle is that it is the duty of the guarantor, not the creditor, to ensure that the debtor performs the principal obligation and that the creditor should have almost unbridled control over the remedies which the contract provides. The creditor should not be hampered in pursuing a specific course of legal action by a person who remains his debtor.

[24] Authority for the rationale is *Moschi v Lep Air Services Ltd*[3] There Lord Diplock made the point that a contract of guarantee gives rise to an obligation on the part of a guarantor to see to it that the debtor performs his own obligations to the creditor. Lord Diplock derived from that that a guarantor is not discharged by the mere voluntary forbearance of the creditor to take steps to obtain timely performance

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1 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 (PC) at 545.

2 James O'Donovan and John Phillips *The Modern Contract of Guarantee* (2nd English ed, Sweet and Maxwell, London, 2010) [11.11]-[11.28].

3 *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL).

by the debtor of the obligation which is the subject of the guarantee, because that does not affect the guarantor's equitable right to compel the debtor to perform it.[4]

[25] Ms Harris also submitted that the remedy for a guarantor liable under a guarantee is to discharge the liability, on which event the guarantor will be subrogated to the position of a creditor under ss 85 and 86 of the Judicature Act 1908, which would allow the guarantor then to exercise the creditor's rights under the security held by the creditor. That approach is consistent with the choice of remedies approach I have referred to.

Doctrine of marshalling

[26] The Arnesens say that the doctrine of marshalling prevents Tegel having an unfettered discretion how it will exercise its remedies. It is necessary to consider the doctrine of marshalling. Salmon J considered it in *Gillespie v Cameron*[5] He quoted the following description of marshalling from *Halsbury's Laws of England*:[6]

> 876. The doctrine of marshalling
>
> Where one claimant, A, has two funds, X and Y, to which he may resort for satisfaction of his claim, whether legal or equitable, and another claimant, B, may resort to only one of these funds, Y, equity interposes so as to secure that A shall not by resorting to Y disappoint B. Consequently, if the matter is under the court's control, A will be required in the first place to satisfy himself out of X, and to resort to Y in case of deficiency only; and, if A has already been paid out of Y, the court will allow B to stand in his place as against X. This is known as the doctrine of marshalling, and is adopted in order to prevent one claimant depriving another claimant of his security. Furthermore, where each of the two funds has been assigned or charged by the debtor to a different subsequent claimant, equity interposes so as to secure that the claim of the first claimant is borne by the two funds rateably."

Salmon J recorded that *Halsbury* also had three conditions must apply:

> 1. The claims must be against a single debtor. The example is given of one creditor having a claim against C and D and another creditor having a claim against D only. The latter creditor cannot require the former one to resort to C unless the liability is such that D could throw the primary liability on C such as where C and D are principal and surety.

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[4] At 348.
[5] *Gillespie v Cameron* (1996) 7 TCLR 376 (HC).
[6] *Halsbury's Laws of England* (4th ed, reissue) vol 16 at [876].

2. The two funds must be at the debtor's disposal.

3. The two funds must exist at the time the issue of marshalling arises.

[27] Salmon J also quoted an article by Derham *Set-off Against an Assignee: The Relevance of Marshalling, Contribution and Subrogation*[7] where marshalling in the context of securities is described as follows:

> "Consider that one creditor (the "double claimant") has two funds (fund 1 and fund 2) originating from the same debtor to which he may resort as security for his debt. In addition, one only of those funds (fund 1) has been charged by the debtor to another creditor (the "single claimant") as security for a debt. Typically this situation may arise where two properties are mortgaged to one creditor as security, and subsequently one of the properties is the subject of a second mortgage to another creditor. If the double claimant were to resort only to fund 1 to satisfy his debt, the single claimant obviously would be disadvantaged because the security that he has for his debt (fund 1) would be depleted. The doctrine of marshalling has the effect of ensuring that the single claimant is not disappointed as a result of the double claimant resorting to fund 1 rather than fund 2."

[28] He also referred to Meagher, Gummow and Lehane's text *Equity: Doctrines and Remedies* which says about marshalling:[8]

> It is fundamental that the double creditor is not to be delayed or inconvenienced in the collection of his debt and enforcement of his security, and, further, if he has been of sufficient prudence to take several securities for the one debt, then his alone is the choice as to which security he first enforces: *Pomeroy's Equity Jurisprudence* 3rd ed s 141; *Union Bank of Georgetown v Laird* 15 US 390 (1817) at 392 per Story J; *Adams: The Doctrines of Equity* (1850) pp.272-3; *Jenkins v Brahe & Gair* (1902) 27 VLR 643 at 648. To hold otherwise would be to diminish his paramount claim in favour of a puisne encumbrancer with a weaker security; the double claimant has "a right to take the first money that is realized by any of his securities which comes to hand": *Wallis v Woodyear* (1855) 2 Jur (NS) 179 at 180 per Page-Wood VC. On the other hand ... And in *Webb v Smith* (1855) 30 Ch D 192 at 200 Cotton LJ spoke as if the double claimant could be restrained by the single claimant from first resorting to the joint fund and this dictum has been quoted with approval.

[29] I note these general principles referred to in Butler's *Equity and Trusts in New Zealand*:[9]

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7 SR Derham *Set-off Against an Assignee: The Relevance of Marshalling, Contribution and Subrogation* (1991) 107 LQR 126 at 129.

8 RP Meagher, WM Gummow and JR Lehane *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992) at [1102].

9 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [36.2.1].

1. The single creditor cannot dictate the order of realisation. This bears out what was stated by *Meagher, Gummow and Lehane*. The double creditor has an unrestricted discretion how to exercise his remedies.[10] Instead, marshalling allows for adjustments to be made after the double creditor has exercised his remedies: the single creditor is then allowed to be subrogated to the position of the double creditor in respect of the securities held by the double creditor, so as to obtain a priority over unsecured creditors. It does not allow the single creditor to restrain the double creditor from exercising his choice of remedies.

2. The debtors may neither invoke nor resist marshalling.[11]

3. It is possible to contract out of the doctrine of marshalling.[12]

4. One common debtor is necessary.[13]

[30] As to the last point, the text goes on to say that there is one exception to the common debtor rule - and this was cited in Mr Lenihan's written submissions for the hearing:

> Generally, marshalling does not apply in the absence of a common debtor. However, the relationship between the debtors may result in the creditor of one of them having the right to require a creditor of both to marshal. An example of this is where a creditor has a claim against two debtors, one of whom, as between themselves, is principal and the other surety. In this case, the surety can require the creditor to marshal his or her securities so that the creditor either resorts first to the fund over which the surety has no charge or holds such funds on trust for the surety.

[31] It is necessary to take into account the following words of the text:

> This exception to the common debtor rule does not affect the double claimants' right to realise their securities in such manner and order as they choose.[14]

[32] Mr Lenihan also referred to the following in *The Modern Contract of Guarantee* at [11-40]:

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10 At [36.3.2], citing *China and South Sea Bank Ltd v Tan*.
11 At [36.2.7].
12 At [36.2.8].
13 At [36.2.2].
14 At [36.2.3].

> As set out by the House of Lords in *Morris v Rayner's Enterprises Incorporated* marshalling is a principle for doing equity between two or more creditors, each of whom is owed debts by the same debtor but one of whom can enforce its claim against one or more security or fund whilst the other can resort to only one. The principle gives the latter an equity to require that the first creditor satisfy itself so far as possible out of the security or fund to which the other creditor has no claim.

[33] The passage in *The Modern Contract of Guarantee* goes on to say:

> Marshalling is therefore applicable to guarantee debts so that upon demand being made by the guarantor, the creditor can be compelled to satisfy itself on the security which it holds. Sometimes the requirement of a single common debtor may not be satisfied.

The text refers to the New South Wales case *Sarge Pty Ltd v Cazihaven Homes Pty*.[15]

[34] The passage that Mr Lenihan relies on can be distinguished from the present case. The passages relied on allow marshalling to occur when the guarantor also holds a security for the debtor's liability to it, that is, the marshalling occurs in a situation where both creditor and guarantor hold securities. In that situation, marshalling comes into play to make adjustments. *Butler* makes clear that although marshalling may occur in the way described in *The Modern Contract of Guarantee*, it does not interfere with the rule that a double creditor retains the right to exercise its remedies in the way it thinks fit.

[35] In this case there is only one secured creditor – that is Tegel. Mr and Mrs Arnesen are not at present creditors of Coastal Cuisine NZ Ltd, nor do they apparently hold any security. In saying that, I make the point that Weekend Holdings Ltd does have a security but that is a corporate entity, distinct from the Arnesens.

[36] Tegel Foods Ltd has security over the accounts receivable of Coastal Cuisine NZ Ltd. That is a single security interest. The Arnesens make no claim to that asset at all. In those circumstances I see no place for the application of the marshalling doctrine.

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[15] *Sarge Pty Ltd v Cazihaven Homes Pty Ltd* (1994) 34 NSWLR 658.

[37] Ms Harris advanced a further submission – that the terms of the guarantee exclude the application of the doctrine of marshalling in any event.

[38] I prefer to put the matter another way. The question comes back to the choice of remedies approach, which allows the creditor to choose which remedies to seek and at what time to seek them. Given that that is the starting point, the question then is whether the terms of the guarantee displace that initial position. As can be seen from the terms of the guarantees I have cited in the earlier part of this decision, there is nothing in the guarantees that displaces that initial presumption. However, I also accept Ms Harris' argument that if marshalling could have any application, then the wording of both guarantees is effective to exclude the doctrine.

[39] The primary basis for Ms Harris' argument is that the guarantees were irrevocable and unconditional, and that under the guarantees Mr and Mrs Arnesen became principal debtors and are not simply sureties. Mr Arnesen's guarantee also provided that the guarantee would not be affected by insolvency, liquidation or receivership, and under 4.4 "any other act event or omission which but for this clause might operate to discharge or otherwise affect the guarantee" and their obligations under the guarantee. It is clear that the intent of this is to leave Tegel with the full range of remedies available to it.

[40] Mr Lenihan made the submission that if it had been intended that marshalling was not to apply, that should be expressly stated. That kind of submission is one that leads to lengthy and tedious drafting of documents, under which every possible contingency has to be expressly listed and addressed. It is a style of drafting which brings the law into disrepute. It is not favoured these days. The general words in both Mrs Arnesen's guarantee and Mr Arensen's guarantee are effective words of exclusion.

[41] Accordingly, I find that the Arnesens' argument as to marshalling does not apply. That means that Tegel Foods Ltd is entitled to proceed now against Mr and Mrs Arnesen, ahead of completion of the receivership. The marshalling argument cannot be effective to prevent Tegel from exercising its remedies now, even though

the Arnesens believe that once the receivership is completed then the debt may be discharged as a result of the receivership.

The prospect of recovery from the receivership

[42] I now address the factual question as to the likely outcome of the receivership.

[43] Ms Finnigan, as receiver of Coastal Cuisine NZ Ltd, and Mr Dalton as liquidator of Poultry Distributors, express wariness about expecting too much to come through as a result of debt-collecting efforts. In taking a cautious approach, they may be reflecting their experience as insolvency practitioners. Nothing I say now is intended to suggest that their judgment on those matters ought to be questioned.

[44] However, they are simply giving their assessments or their views as to how events might unfold. It remains a possibility that the liquidation of Poultry Distributors and the receivership of Coastal Cuisine NZ Ltd may result in further payments to Tegel Foods Ltd. For summary judgment purposes, it remains arguable that a payment could be made. I cannot make a definitive finding in Tegel Foods Ltd's favour that recovery is totally excluded.

Exercise of discretion

[45] The fact that there is some prospect of future recovery from the receivership does not mean that the court should withhold giving judgment to Tegel Foods Ltd now. It has established liability under the guarantees. It has established that the doctrine of marshalling does not stand in its way in pursuing Mr and Mrs Arnesen on their guarantees. It has established the amount payable under the guarantees taking into account the payments made to date under the receivership.

[46] On ordinary summary judgment principles, Tegel Foods Ltd is entitled to recover judgment now. The discretion to withhold judgment is rarely exercised once the grounds for summary judgment have been established. There is nothing in the

circumstances of this case that suggests that this is an exceptional case. If there were cogent evidence that the receivers were about to make a payment tomorrow, which would clear the debt in full, then there might be reason to withhold judgment to see whether payment comes through. But at this stage the likelihood of further payment is still distant.

Result

[47] Accordingly I make these orders:

[a] Tegel Foods Ltd recovers judgment from Mr and Mrs Arnesen for the sum of $177,371.14.

[b] Tegel Foods Ltd recovers interest on that sum at the default rate of 14.8 per cent per annum from 12 March 2013 until the date of judgment.

[c] Tegel Foods Ltd recovers judgment in the sum of $35,962.46 for its legal costs in enforcing its securities under its terms of trade. I note that these costs are largely attributable to the actions of Mr and Mrs Arnesen in obstructing the receivers at the outset.

[d] Tegel Foods Ltd recovers its solicitor-client costs in the sum of $20,916.06 under its terms of trade.

[e] Interest on the judgment sum will run at 5 per cent per annum.

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Associate Judge R M Bell